82-929

No. 82—

IN THE

Supreme Court of the United States

DECEMBER TERM, 1982

GERALD BURKS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the defendant was denied due process by knowing use of perjured testimony or by a false statement by the prosecutor in his argument to the jury.

The defendant, Gerald Burks, was convicted of murder and sentenced to 50 years in the penitentiary. A witness, Henry Trapp, testified that he assisted the defendant, his co-defendant and another man named Shannon in the killing of Venson Bass.

At the time he testified there was an armed robbery charge pending against him. He testified that he was expecting leniency in sentencing. After the defense attorney in his closing argument urged that Trapp would not go to the penitentiary, the Assistant State's Attorney denied that in his argument and told the jury that Trapp was going to the penitentiary.

Less than a month after the trial the State dismissed the robbery indictment against Bass.

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, appears in Appendix A hereto. The opinion was rendered in an order under Illinois Supreme Court Rule 23. *People* v. *Harris* (1982), 104 Ill. App. 3d 1202, 437 N.E. 2d 944.

PARTIES BELOW

The names of all parties to this petition appear in the caption of the case.

JURISDICTION

On March 25, 1982, the Appellate Court of Illinois, First District, affirmed the conviction of the defendant. On October 5, 1982, the Supreme Court of Illinois denied the defendant's petition for leave to appeal. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV.

> § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Henry Trapp testified that he had dealt in narcotics with the defendant for about four months. He and Eddie Harris went to "Marlo's Dope House" to pick up the deceased, Venson Bass, and drove him to "Marlo's" apartment. He said that Harris and Bass went into the apartment building. He then saw Herman Shannon come out of the building, followed by Harris and the defendant supporting Bass. Bass was slumped over and bleeding. They all got into the car and Burks and Shannon were talking to Bass. He heard Bass say he didn't take any money. Harris got into the back seat of the car, hit Bass with a pistol and then shot him in the neck. He said he stayed in the car while Shannon, Burks and Harris took Bass and dumped him into the lake. He heard Harris say Bass was trying to swim, and then he heard four or five more shots.

Trapp had previous convictions for robbery in 1975 and was sentenced to the penitentiary for one year to one year and a day. In September of 1972, he was convicted of misdemeanor theft in Evanston, Illinois and sentenced to nine months in the County Jail. At the time he testified, he had an armed robbery charge pending in the Circuit Court of Cook County.

He first became a narcotics addict in 1968. He was addicted to heroin. He completed a detoxification program but began using heroin again. After he got out of the penitentiary, he got a job as an ex-addict counselor in a federally funded program. After that program closed, he began using heroin until the latter part of 1977. He was using narcotics at the time of the shooting of Bass.

At the time he testified, he was residing in the witness quarters of the County Jail which are maintained by the

State's Attorney. He had testified in the armed robbery case that was pending against co-defendants. He testified with the hope that he would get a "lesser sentence." The State's Attorney asked him if he would testify, since his intentions "were pleading guilty anyway," because he was involved in it. He agreed to testify with his own hope that perhaps he would get a lesser sentence. They told him to testify and take his chances. He was hoping they would be lenient. There is a mandatory sentence in that type of crime, so he was hoping to get a lesser sentence. At first when he talked to the State's Attorney, he told him he didn't know anything about the robbery.

In his closing argument, the defense attorney argued that Trapp would not go to the penitentiary. In the State's closing argument, Assistant State's Attorney Arthur refuted that statement and said, "Trapp is going to the penitentiary. We are not going to set them up. They are not going to live at the Hyatt Regency tomorrow. They are going to the penitentiary."

At a post-trial hearing, the other Assistant State's Attorney, Wayne Meyer, was questioned by the defendant's attorney about what agreement had been made with Trapp. The following occurred:

> "Mr. Cohn: Q. The decision was then made that Harry Trapp would not be prosecuted for murder. Isn't that true?
>
> "A. There was a decision made that he be given some sort of consideration. But I was never quite clear how much consideration would be given in that I was only assisting the prosecution of the case. And Scott Arthur was the main prosecutor. Obviously he had to check with his superiors.
>
> "Q. You knew; you were privy to the conversation that he would be given a benefit, weren't you?

"A. No. I was never involved in any discussion with him regarding immunity or with my supervisors or anybody else.

"Q. You mean you never talked with Mr. Arthur as to what benefits would accrue to the witness, Mr. Trapp?

"A. I knew Mr. Trapp was to be given some consideration. Whether that would be a full dismissal of the charges or pleading to a reduced charge, I never really was clear. It was really irrelevant to me.

"Q. Well, who examined Mr. Trapp?

"A. I don't recall, Counsel. I forget.

"Q. Well, how long did you work with Mr. Arthur on this case prior to its going to trial?

"A. I would have to guess maybe a week, maybe a little more. I'm really not sure.

"Q. And you knew that some consideration was going to be given Mr. Trapp for his testimony?

"A. Yes."

The defense then attempted to call Assistant State's Attorney Arthur to question him about what agreement had been made with Trapp. Arthur's objection to being called was sustained.

Less than a month after the trial, on June 18, 1980, Judge Thomas J. Fitzgerald allowed the State's motion to dismiss the pending robbery case against Trapp.

The constitutional question was not raised during the trial because the State did not dismiss the indictment against Trapp until 27 days after the jury verdict was rendered. It was raised in the Appellate Court in the defendant's opening brief. The Appellate Court passed on the question thus (See Appendix, Rule 23 Order, p. 11):

> In response during rebuttal argument the State's Attorney made the comment that Trapp is going to

the penitentiary. During post-trial motions one of the prosecutors who argued the case testified that he knew that Trapp was to be given some consideration. Burks argues that in the instant case Trapp was not prosecuted and he was not returned to the penitentiary. In another matter pending against Trapp the charges were dismissed. Although the record is not entirely clear on the subject, we do believe that the prosecutor was in error in making the statement. However, considering the extensive cross-examination on the subject and the fact that Trapp admitted that he had become the State's witness in an armed robbery case in hope of receiving some consideration, Trapp's character was fairly before the jury and this one comment does not warrant a new trial.

REASONS FOR GRANTING THE WRIT

In *Napue* v. *Illinois* (1959), 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, the defendant was convicted of murder principally on the testimony of a supposed eyewitness to the crime. That witness, George Hamer, had already been convicted of murder and sentenced to 199 years in the penitentiary.

Hamer testified that although he was serving a sentence for murder, he had not received any promises of "consideration" or a reduction of sentence in exchange for his testimony. (360 U.S. 264, 267-268, Notes 2, 3.) As in this case, the prosecutor never corrected that testimony.

After trial, the prosecutor filed a petition seeking a reduction of Hamer's sentence. He stated that he had "represented to Hamer that if he would be willing to cooperate with law enforcing officials . . . a recommendation for a reduction of his sentence would be made and, if possible, effectuated." (360 U.S. 264, 266, n. 1.)

This court reversed the conviction, holding that the prosecutor's failure to correct testimony he knew to be false deprived the defendant of a fair trial. This court further held that the basic rule that a State may not knowingly use false testimony to obtain a conviction "does not cease to apply merely because the false testimony goes only to the credibility of the witness." (360 U.S. 264, 269-70.)

Those principles were reaffirmed in *Giglio* v. *United States* (1972), 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104. In that case, like *Napue* and the present case, the defendant was convicted principally on the testimony of an alleged co-conspirator in the crime. In addition, the prosecutor there, as here, falsely stated in his closing argument that no promises had been made to the witness. The court reversed the conviction because the prosecutor failed to correct the witness' false testimony that he had not been promised any prosecutorial leniency in exchange against the defendant. The court held that such prosecutorial misconduct required reversal regardless of whether the failure to correct the witness' testimony was the result of negligence or by actual design. (405 U.S. 150, 154.)

In *United States* v. *Pope,* (9th Cir. 1976), 529 F. 2d 112, the defendant was prosecuted for armed robbery; and the prosecution's key witness was an alleged participant in the robbery. The witness was permitted to plead guilty to the lesser included offense of plain robbery. On April 1 and 2, 1975 he testified against the defendant's brother; and a week later he testified before a federal grand jury implicating the defendant. Thirteen days thereafter he was sentenced to serve only 150 days out of a 10 year suspended sentence.

A month and a half later he testified against the defendant. When he was asked about his guilty plea, he said that there was not any kind of agreement between him and the United States Attorney's office and there was no understanding at all with respect to his pleading guilty.

In final argument the government's attorney argued that the witness had no reason to lie, that he received "admittedly a light sentence." After trial, affidavits from the witness' attorney and the United States Attorney established that there was an agreement that the witness would be permitted to plead guilty to the lesser offense in return for his testimony against the defendant's *brother*. The government's argument in the Court of Appeals was that the promise extended to the witness' testimony against the defendant's brother and not the defendant. The Court of Appeals rejected that argument and reversed the conviction relying upon *Napue* and *Giglio*.

A case factually on all fours with this case is *United States* v. *Smith* (5th Cir. 1973), 480 F. 2d 664. The government and the witness entered into a plea bargain agreement whereby the government would not oppose probation in return for the witness' testimony. The terms of the agreement were not made known to the defense attorney. On cross-examination the witness said that he would have testified without any deals; and that the only deal he had was that he would get a two year prison term in return for his guilty plea.

During closing argument the defense attorney pointed to the government's agreement with the witness involving only two years in prison. The prosecutor, on rebuttal, attempted to reestablish the credibility of his witness thus:

> "Wayne Smiddy [the witness] and Troy Kivett made a deal with the government. *It was for two years in a*

> *federal penitentiary. That is a fantastic deal,* ladies and gentlemen. Troy Kivett pleaded guilty to one count which he can serve up to five years in the federal penitentiary. Is that a great deal?" (480 Fed. 2d 664, 666.) (Emphasis in opinion.)

The Court of Appeals reversed with this pointed observation (480 F. 2d, 664, 666):

> "This statement, although partially true, was not the whole truth and, in fact, the sentence 'It was for two years in a federal penitentiary' was such an affirmative misrepresentation as to make it, as used, absolutely false. The prosecutor who made this statement was the only party at the trial who had knowledge of the entire bargain."

We submit that the facts of this case are more egregious than the four Federal cases we have just cited.

We all must be considered consummate fools if the State expects us to believe that its agreement with Trapp was for a lesser sentence in the penitentiary. It is obvious that the jury was misled by the closing argument of Assistant State's Attorney Arthur; and to compound the matter, the trial judge was misled by the post-trial testimony of Assistant State's Attorney Meyer, who would have the court believe he was just a hired hand who came into the case late and had hazy idea of the agreement. He did not know whether it was "for a full dismissal of the charges or pleading to the reduced charge. He "never really was clear. *It was really irrelevant" to him.* (Emphasis added.) That is a shocking statement from a quasi-judicial officer who owes an obligation to the defendant to *insure* that he will receive a fair trial. The other Assistant State's Attorney, Mr. Arthur, who made the statement, made certain that he would not be questioned about the agreement. He objected to even testifying at the post-trial hearing; and that objection was sustained.

What is even more shocking about all this is that the Appellate Court charitably dismisses this argument with the statement that it believes "the prosecutor was in error in making that statement." (See Appendix A, Rule 23 Order, p. 11) The Appellate Court simply said, "This one comment does not require reversal"; and based its conclusion on the fact that Trapp had admitted that he had become a State's witness in an armed robbery case in hope of receiving some consideration. That precise reasoning was rejected in *Napue* v. *Illinois* in which this court said that a prosecutor has the duty to correct what he knows to be false and to elicit the truth; that it is immaterial that a falsehood bore only upon credibility; and that it was immaterial that the jury was apprised of other grounds for believing that the witness had received consideration. (3 L. Ed. 2d 1217, 1221.) These facts are worse than *Napue*.

CONCLUSION

For all these reasons we respectfully pray that this court will order that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First District.

Respectfully submitted,

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